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No. 1066

In the

Supreme Court of the United States

OCTOBER TERM, 1969

CITY OF PHOENIX, ARIZONA, et al.,

Appellant,

vs.

EMILY KOLODZIEJSKI,

Appellee.

On Appeal from the United States District Court
for the District of Arizona

BRIEF ON THE MERITS FOR POUDRE SCHOOL DISTRICT R-1, LARIMER COUNTY, COLORADO, AS AMICUS CURIAE

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I. AUTHORITY FOR FILING

In accordance with Rule 42 (4) of this Court, this brief is filed without prior consent. It is filed on behalf of Poudre School District R-1, Larimer County, Colorado, a political subdivision of the State of Colorado. It is sponsored by the authorized legal representative of the district.

II. INTEREST OF AMICUS CURIAE

In 1969 the Poudre R-1 School District determined that a substantial land acquisition, building and furnishing program had to be undertaken to fulfill its responsibility to pro-

vide adequate schooling for the children attending its schools. Since additional monies had to be acquired to undertake and complete the program, the District looked for a method available to it to generate those funds. The only method available pursuant to Colorado constitutional and statutory provisions was the issuance of *general obligation* bonds.

On June 16, 1969, this Court rendered its decision in *Cipriano v. City of Houma*, 395 U.S. 701, 89 S.Ct. 1897, 23 L.Ed. 2d. 647. In that case, Louisiana statutory provisions authorizing municipalities to issue *revenue* bonds only if approved by a majority of property taxpayers entitled to vote were held to violate the equal protection clause of the Fourteenth Amendment to the United States Constitution.

Also on June 16, 1969, this Court, in *Kramer v. Union Free School District*, 395 U.S. 621, 89 S.Ct. 1886, 23 L.Ed. 2d 583, likewise held a New York statute limiting the franchise in certain school board elections to owners or lessees of taxable real property located in the school district involved, spouses of such owners or lessees, or parents or guardians of children enrolled for a specified time in a school of the district, violative of the equal protection clause. Both the *Cipriano* and *Kramer* opinions, however, assumed, without deciding, that a state might, in some circumstances, constitutionally exclude otherwise qualified voters who are in fact substantially less interested or affected than those voters to whom the particular franchise is limited. *Cipriano* at 704, 89 S.Ct. 1899 - 1900, *Kramer* at 632, 89 S.Ct. 1892.

Fully aware of the *Cipriano* and *Kramer* decisions a school *general obligation* bond election was scheduled and held in the School District on October 14, 1969. The election was limited to qualified taxpaying electors pursuant to the limitations of Article XI, Section 7 of the *Constitution of Colorado* and as defined by *Colorado Revised Statutes* 1963, 1965 Perm. Cum. Supp. 123-11-1 (4).

The results of the election were duly canvassed and certified at a meeting of the board of the School District on Octover 15, 1969, and it was determined issuance of the bonds had been approved. A public sale of a portion of the bonds authorized was scheduled and advertised for December 8, 1969.

On November 17, 1969, the decision of the trial court in this case was announced. The three-judge panel's decision made no distinction between an election held to authorize *revenue* bonds, as had been held violative of the equal protection clause in *Cipriano,* and an election held to authorize *general obligation* bonds, as had not previously specifically been held violative of such clause by this Court. Further, the trial court gave its decision retrospective effect by making it apply from June 16, 1969, the date of the *Cipriano* decision.

Because of the great uncertainty cast on the validity of the *general obligation* bonds of the Poudre R-1 School District by the trial court's decision in this case, the December 8, 1969, sale was cancelled. Although the time for contesting the election by an excluded elector pursuant to Colorado law has long since passed, *Colorado Revised Statutes* 1963, 1965 Perm. Cum. Supp. 123-11-12 (2), the marketability of the bonds is still doubtful because of the decision of the lower court here.

The School District's interest corresponds to the interest of the *City of Phoenix,* et al., in that both followed the only constitutional and statutory procedures available to them to authorize the issuance of *general obligation* bonds. The School District's interest further corresponds to the interest of the City of Phoenix in that the franchise in both cases was limited to otherwise qualified electors who would be directly responsible for repaying the bond debt and who could have liens placed against their property because of the issuance of the bonds. The School District's interest differs somewhat from the interest of the City of Phoenix, et al., however, because, unlike the practice followed by the City of Phoenix in repaying

the debt from monies generated by means other than property tax in addition to property tax sources, the School District, pursuant to Colorado statutes, can repay the debt only through real and personal property tax sources, *Colorado Revised Statutes* 1963, 1965 Perm. Cum. Supp. 123-11-19.

III. SUMMARY OF THE ARGUMENT

A. There Is a Compelling State Interest Involved in Limiting the Franchise to Qualified Voters Who Are Also "Specially Interested" in *General Obligation* Bond Approval Elections.

This Court has long recognized that states may determine the conditions under which the right of suffrage may be exercised. This Court just last year in *Kramer* and *Cipriano* assumed that a state might limit the franchise to qualified voters who are also "specially interested" in the election.

As was explained in *Kramer* and *Cipriano,* if a state articulates a state interest to limit the franchise in a certain election to those who are "specially interested," this Court, on review, looks first to see if the classifications of otherwise qualified voters excluded are tailored to meet that articulated state goal. If the exclusions are necessary and the classifications are made with sufficient precision to accomplish the articulated goal, this Court next looks to see if the state interest promoted by limiting the franchise constitutes a compelling state interest.

Revenue Bonds are paid only from the operations of the utility involved; they are not financed in any way by property tax sources. *General obligation* bonds, conversely, are financed either wholly or in part by property tax sources.

Property taxpayers have a substantially greater interest in the outcome of *general obligation* bond elections than other electors who are not property taxpayers because the effect of a *general obligation* bond issue is to impose a lien on the taxpayers property for payment of the bonds. This "special

interest" of a property taxpayer in *general obligation* bond elections is in sharp contrast to the interest of all electors in *revenue* bond elections where property taxpayers and non-taxpayers alike are as substantially affected.

Colorado school district indebtedness can be created only by *general obligation* bonds. Colorado school district *general obligation* bonds can be repaid only from *ad valorem* school taxes levied on real or personal property within the district.

The status of Arizona municipal bond and Colorado school district bond constitutional and statutory law on the matter of exclusion of non-property taxpaying electors in *general obligation* bond elections is substantially the same. The Poudre R-1 School District submits that there is a compelling state interest to protect those who will have a lien placed on their property for the payment of a tax from being told they will have that lien by others who will not have it. Detailed argument on this compelling state interest issue is left to the parties themselves.

B. The Judgment Below Should Not Be Given Retroactive Effect.

In the *Cipriano* case last year, this Court applied prospectively only its decision holding non-taxpayer exclusions violative of the equal protection clause of the Fourteenth Amendment. This was done for the expressed purpose of avoiding the injustice or hardship of a holding which would apply retroactively on cities, bondholders and others connected with municipal utilities. In another case last year, *Allen v. State Board of Elections,* 393 U.S. 544, 89 S.Ct. 817, 22 L.Ed. 2d 1, this Court supported a holding to be applied prospectively only for the following reasons: first, because the issues were complex issues of first impression in this Court; second, because the issues were subject to rational disagreement; third, because the incorrect position of the losing party did not constitute a deliberate defiance of the law; and, fourth, because the

judgment did not end the matter as far as other situations to be determined in the future.

The decision of the Court below was founded upon two mutually exclusive grounds: first, that there was no evidence before it which would justify a distinction between *revenue* and *general obligation* bonds; and, second, that there was no evidence to support a conclusion that the franchise exclusions were necessary to promote a compelling state interest.

If this Court upholds the decision below because of the absence of evidence to justify a distinction between *revenue* and *general obligation* bonds, such a determination will forestall the necessity of this Court to reach the issue of whether or not the franchise exclusions promoted a compelling state interest. Such a determination then would leave intact and unmodified the assumption made in both *Kramer* and *Cipriano* that a state might, in some circumstances, constitutionally limit the franchise to qualified voters who are also 'specially interested' in the election. If this assumption means anything at all, it must mean that a state can, under proper circumstances, constitutionally limit the franchise in school *general obligation* bond elections to those qualified voters who alone will be burdened by the repayment of the bonded indebtedness.

Unlike the practice in Phoenix, Arizona, where other sources besides property tax sources can be relied upon for the payment of the bonds, in Colorado *general obligation* bonds of school districts can be repaid only from *ad valorem* taxes on real and personal property. This Court, therefore, should not render a decision which would terminate the matter to the detriment of those political subdivisions wherein a basis for distinction exists. These political subdivisions to this date should have the right to rely upon the announcements in *Kramer* and *Cipriano* that in proper cases they can constitutionally limit the franchise to qualified voters who are specially interested in the election.

If, on the other hand, this Court determines that there are distinctions between *revenue* and *general obligation* bonds, it will become necessary for this Court to reach and determine the issue of whether or not the franchise exclusions promote a compelling state interest. Thereupon, the scope and effect of *Cipriano* will be surpassed for this Court in *Cipriano* did not reach this second issue. Under these circumstances, rather than determining this case upon the *Cipriano* decision, this Court will be necessarily required to make a determination on complex issues of first impression in this Court - issues subject to rational disagreement.

If the lower court is upheld because the facts do not justify a distinction between this case and *Cipriano,* the decision here will not end the matter as to those political subdivisions wherein a basis for distinction exists. The decision should be given only prospective effect because franchise limitations in those political subdivisions where a basis for distinction exists would not constitute a deliberate defiance of any holding of this Court. If the lower court is upheld on the compelling state interest ground, the decision should be given only prospective effect because the question involves complex issues of first impression in this Court and because the issues are subject to rational disagreement.

IV. ARGUMENT

A. There is a Compelling State Interest Involved in Limiting The Franchise to Qualified Voters Who Are Also "Specially Interested" in *General Obligation* Bond Approval Elections.

1. The *Kramer* and *Cipriano* Holdings Analyzed.

On June 16, 1969, this Court decided two cases in which limitations on the franchise were questioned on the basis of denial of the equal protection of the laws guaranteed by the

Fourteenth Amendment to the United States Constitution, *Kramer v. Union Free School District,* 395 U.S. 621, 89 S.Ct. 1886, 23 L.Ed. Ed. 583, and *Cipriano v. City of Houma* 395 U.S. 701, 89 S.Ct. 1897, 23 L.Ed. 2d. 647. This Court had previously recognized:

> "The States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised . . . . absent of course the discrimination which the Constitution condemns. *Lassiter v. Northhampton Community Board of Elections,* 360 U.S. 45, 50, 79 S.Ct. 985, 989, 3 L.Ed. 2d 1072 (1959).

The particular statutory provisions in *Kramer* and *Cipriano* were struck down, however, as authorizing discrimination which the Constitution condemns.

Both *Kramer* and *Cipriano* assumed, without deciding, that, in the words of *Cipriano*:

> "Whether the statute so limiting the franchise denies equal protection of the laws to those otherwise qualified voters who are excluded depends on whether all those excluded are in fact substantially less interested or affected than those the statute includes." *Cipriano* at 704, 89 S.Ct. at 1900, cf. *Kramer* at 632, 89 S.Ct. at 1892.

Kramer explained this latter qualification as follows:

> "In other words, the classifications must be tailored so that the exclusion of appellant and members of his class is necessary to achieve the articulated state goal" *Kramer* at 632, 89 S.Ct. at 1892.

In a footnote, *Kramer* went on to observe:

> "Of course, if the exclusions are necessary to promote the articulated state interest, we must then determine whether the interest promoted by limiting the franchise constitutes a compelling state interest. We do not reach that issue in this case" footnote 14 at 632, 89 S.Ct. at 1892.

In *Kramer,* the New York legislature had articulated a state goal of limiting the franchise in school district board member

elections to those "primarily interested in school affairs." The limitations on the franchise were:

> "To be eligible to vote at an annual district meeting, an otherwise qualified district resident must either (1) be the owner or lessee of taxable real property located in the district, (2) be the spouse of one who owns or leases qualifying property, or (3) be the parent or guardian of a child enrolled for a specifed time during the preceding year in a local district school." *Kramer* at 623, 89 S.Ct. at 1887.

This Court held such limitations violative of the equal protection clause of the Fourteenth Amendment because:

> ". . . close scrutiny of the . . . classifications demonstrates that they do not accomplish the purpose with sufficient precision to justify denying appellant the franchise." *Kramer* at 632, 89 S.Ct. at 1892.

In *Cipriano,* the Louisiana legislature had articulated a state goal of limiting the franchise in municipal utility *revenue* bond approval elections to voters with a "special interest" by limiting the franchise to "taxpayers qualified to vote". The facts were that:

> "The *revenue* bonds are to be paid only from the operations of the utilities; they are not financed in any way by property tax revenue." *Cipriano* at 705, 89 S.Ct. at 1900.

However;

> ". . . the benefits and burdens of the bond issue fall indiscriminately on property owners and non-property owners alike." *Cipriano* at 705, 89 S.Ct. at 1900.

This Court observed:

> "When, as in this case, the State's sole justification for the statute is that the classification provides a 'rational basis' for limiting the franchise to those voters with a 'special interest.' "

as a prelude to its holding that:

> "(because) the challenged statute contained a classifica-

tion which excludes otherwise qualified voters who are as substantially affected and directly interested in the matter voted upon as are those who are permitted to vote . . . the statute clearly does not meet the 'exacting standard of precision we require of statutes which selectively distribute the franchise' " *Cipriano,* at 706, 89 S.Ct. at 1900, citing *Kramer* at 632, 89 S.Ct. at 1892.

In both *Kramer* and *Cipriano,* then, the issue of whether the interest promoted by limiting the franchise constituted a compelling state interest was not met because the classifications of voters excluded were not tailored to achieve the articulated state goal. It is submitted that the issue of compelling state interest is before this Court in this case, however, because the classifications of voters excluded by Arizona law are tailored to meet the articulated state goal of limiting the franchise only to those qualified voters who are directly affected by the burden of repaying the debt.

2. ***Revenue*** **Bonds and** ***General Obligation*** **Bonds Distinguished.**

The lower court here found:

"Moreover, in the instant case we find no evidence which would justify a distinction between *Revenue* Bonds and *General Obligation Bonds.*" (page 3 of unreported opinion)

This finding was made despite the fact that the Arizona constitution provided that:

"Questions upon bond issues . . . . shall be submitted to the vote of real property tax payers who shall also in all respects be qualified electors." Constitution of Arizona, Art. 7, §13.

An Arizona statute provided that:

"After the bonds are issued, the governing board . . . . . shall annually levy and cause to be collected a tax . . . . . upon all taxable property in such political subdivision, sufficient to pay the interest on the bonds when due, and

. . . . to redeem the bonds when they mature . . . ." A.R.S. 1959, §35-458.

The Arizona Supreme Court had interpreted the articulated state interest in making the franchise limitation and consequent exclusion as follows:

> "Undoubtedly the framers of our constitution had in mind by the enactment of this provision that the creation of indebtedness to be evidenced by bonds payable not in the immediate future but rather over a long period of years should only be with the consent of the majority of those whose property was to be obligated." *Ackerman v. Boyd,* 74 Ariz. 77, 244 P. 2d 351, 354.

As was carefully explained in the *Cipriano* case:

> ". . . *Revenue* bonds are to be paid only from the operations of the utilities; they are not financed in any way by property tax revenue." at 705, 89 S.Ct. at 1900.

Conversely, *general obligation* bonds are financed either wholly or in part by property tax revenue.

> "While there is a paucity of judicial authorities on the subect, it was held by the Supreme Court of Oregon, in *City of Eugene v. Willamette Valley Co.,* 52 Ore. 490, 97 P. 817, 821, that the phrase *'general obligations'* means 'a municipal debt, for the payment of which provision must be made by devoting funds raised by taxation, thereby appropriating in discharge thereof a pro rata share of the burden upon all property in a specified district that is subect thereto.' No authorities have been cited to the contrary." *Baker Watts & Co. v. Saxon,* 261 F. Supp. 247, 252 (DDC 1966)

It is generally true that *general obligation* bonds can be marketed on terms more favorable to the issuing entity than *revenue* bonds.

It is recognized that there are many different methods of financing *general obligation* bonds. Those methods may range from those financed solely by property tax revenues to those intended to be financed entirely by revenues generated by

the operation of the utility involved, with the property tax resource being merely available to fall back on if the utility does not generate enough revenue (For example, see Brief for Salt Lake City, Utah, as Amicus Curiae, pages 17 and 18).

School districts, to say the least, have limited revenue generating resources. School district *general obligation* bonds, per se, must either be solely dependent on property tax resources or so largely dependent on property tax resources as to be effectively dependent thereon. As was stated in *Muench v. Pain*, ____ Ida. ____, 463 P.2d 939, 945-946 (1970):

> "It is apparent that the real property taxpayers have an interest in the outcome of school district bond elections substantially greater than other electors who are not also taxpayers or real property . . . . . Although non-property owners might feel the financial impact of a bond issue indirectly through increased rentals and prices in the economy and might have children attending the public schools, the effect of a bond issue upon the real property owner is to impose a lien upon his property for payment of the bonds."

See also *Settle v. City of Muskogee, et al.*, ____ Okla. ____, 462 P.2d 642, (1969), and *Settle v. Board of County Commissioners of the County of Muskogee*, et al., ____ Okla. ____, 462 P.2d 646 (1969).

3. School *General Obligation* Bond Approval Franchise Limitations in Colorado.

a. The State Interest in Exclusion Is Articulated.

The Colorado constitutional provision applicable to the School District's problem is as follows:

> "*Debt for school buildings - how created.*
>
> No debt by loan in any form shall be contracted by any school district for the purpose of erecting and furnishing school buildings, or purchasing grounds, unless the proposition to create such debt shall first be submitted to such

qualified electors of the district *as shall have paid a school tax therein,* in the year next preceding such election, and a majority of those voting therein shall vote in favor of incurring such debt." (emphasis added) *Colorado Constitution* - Article XI, Section 7.

This constitutional provision is supplemented by the following Colorado statutes:

"Bonded indebtedness - elections - districts of seventy thousand or less enrollment. (1) The board of education of any school district with a school enrollment of seventy thousand or less, at any regular biennial school election or at a special election called for the purpose, *may submit to the registered qualified taxpaying electors of the district the question of contracting a bonded indebtedness* for the purpose of purchasing grounds, or for erecting and furnishing school buildings, or for funding floating indebtedness, or for any one or more of said purposes, which purposes shall be broadly construed, subect to the limitations provided in section 123-11-4." (emphasis added) *Colorado Revised Statutes* 1963, 1965 Perm. Cum. Supp., 123-11-3.

" 'Taxpaying elector' and 'qualified taxpaying elector' mean any person who is at least twenty-one years of age, a citizen of the United States, and who has resided in the state for twelve months, in the county for ninety days, in the school election precinct fifteen days immediately preceding the election at which he offers to vote, *and who, during the twelve months next preceding said election, has paid an ad valorem school tax upon property situated within the school district and owned by said person;* and the term 'registered qualified taxpaying elector' means a qualified taxpaying elector who has registered pursuant to the requirements of section 123-11-1." (emphasis added) *Colorado Revised Statutes* 1963, 1965 Perm. Cum. Supp., 123-11-1. *Definitions.* Subsection (4)

" 'Ad valorem school tax' and 'general ad valorem school tax' mean only the general property tax, levied annually on real or personal property listed with the county assessor. No person shall be qualified as a taxpaying elector for the purpose of this article or article 12 of this chapter

by the payment of any one or more of the following taxes: Income tax, sales tax, use tax, excise tax, specific ownership tax on a motor vehicle or trailer, or any other tax which is not a general ad valorem school tax as defined in this subsection (5), and the generality of said definition shall never be restricted by the listing set forth in this subsection (5). *Colorado Revised Statutes* 1963, 1965 Perm. Cum. Supp., 123-11-1. *Definitions.* Subsection (5)

Tax levy to pay principal and interest.

"(1) Whenever any school district shall have issued bonds under the provisions of this article, it shall be the duty of the board of county commissioners of the county in which said district is situated, at the time of levying other school district taxes, to levy a tax on all the taxable property of said district at a rate sufficient to produce such amount or amounts as shall have been certified by the board of education of said district, for the purpose of paying bonds not yet due, . . . *Colorado Revised Statutes* 1963, 1965 Perm. Cum. Supp., 123-11-19.

School district indebtedness, therefore, can be created only by *general obligation* bonds. School district *general obligation* bonds can be repaid only from *ad valorem* school taxes levied on real or personal property.

b. The Voters Excluded Are Necessarily Excluded to Promote the Articulated State Interest.

The system of including only those eligible voters who will pay the tax which will pay the debt obviously conforms perfectly to the legislative intent of limiting the franchise to those who will bear the burden of the bond debt. See *Muench v. Pain*, ____ Ida ____, 463 P.2d 939 (1970); *Settle v. City of Muskogee, et al.*, ____ Okla ____, 462 P.2d 642 (1969); and *Settle v Board of County Commissioners of the County of Muskogee*, ____ Okla ____, 462 P.2d 646 (1969). The issue which defeated the New York and Louisiana statutes in *Kramer* and *Cipriano*, supra, therefore is met in Colorado and the issue not met in *Kramer* and *Cipriano* - i.e. whether the interest

promoted by limiting the franchise constitutes a compelling sate interest - must be reached.

4. The State Interest Promoted by Limiting the Franchise in *General Obligation* Bond Elections Is a Compelling State Interest.

This is the issue which should be reached in this case. The Poudre R-1 School District, as Amicus Curiae, leaves the argument on this issue to the parties themselves.

The School District is of the opinion, on the basis of the facts, and on the basis of the arguments presented by the parties in the lower court and in their briefs in this Court, that the position of the City of Phoenix et al., is correct - i.e. that the State of Arizona can limit the franchise in *general obligation* bond elections to qualified voters who are 'specially interested' in the election because of the direct burden of repaying the tax earmarked for the payment of the debt undertaken by the issuance of the bonds. There is a compelling state interest to protect those who will have a lien placed on their property for the payment of a tax from being told they will have that lien by others who will not have it. *Muench v. Pain,* supra, *Settle v. City of Muskogee,* supra, *Settle v. Board of County Commissioners of County of Muskogee,* supra.

B. The Judgment Below Should Not Be Given Retroactive Effect.

1. *Cipriano* Was Given Only Prospective Effect.

In *Cipriano,* This Court reasoned:

"Significant hardships would be imposed on cities, bondholders and other connected with municipal utilities if our decision today were given full retroactive effect . . . Where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of non-retroactivity." at 706, 89 St. at 1900.

Based on this reasoning this Court held:

> "Therefore, we will apply our decision in this case prospectively. That is, we will apply it only where, under state law, the time for challenging the election result has not expired, or in cases brought within the time specified by state law for challenging the election and which are not yet final. Thus, the decision will not apply where the authorization to issue the securities is legally complete on the date of this decision." at 706, 89 S.Ct. at 1901.

Earlier in 1969, this Court had held that Section 5 of the Voting Rights Act of 1965, 79 St. 437, 42 USC §1973 et seq., required certain changes in state election laws be submitted to the United States Attorney General for approval or that an action for declaratory judgment be brought. This Court further held, however:

> "Appellants in the Mississippi cases have asked this court to set aside the elections conducted pursuant to these enactments and order that new elections be held under the pre-amendment laws. The Solicitor General has also urged us to order new elections if the State does not promptly institute §5 approval proceedings. We decline to take corrective action of such consequence, however. These §5 coverage questions involve complex issues of first impression — issues subect to rational disagreement. The state enactments were not so clearly subject to §5 that the appellees' failure to submit them for approval constituted deliberate defiance of the Act. Moreover, the discriminatory purpose or affect of these statutes, if any, has not been determined by any court. We give only prospective effect to our decision, bearing in mind that our judgment today does not end the matter so far as these States are concerned." *Allen v. State Board of Elections*, 393 U.S. 544, 571-572, 89 S.Ct. 817, 22 L.Ed. 2d 1, (1969).

2. If the Decision of the Lower Court Is Upheld.

The decision of the lower court was based on two alternative, mutually exclusive grounds. The first ground was that "we find no evidence which would justify a distinction between *Revenue* Bonds and *General Obligation* Bonds." (page 3 of

unreported opinion). The second ground was "There was no evidence before this Court which would justify the conclusion that the exclusions under Arizona law are necessary to promote a compelling State interest" (page 3 of unreported opinion)

a. On the "No Evidence Which Would Justify a Distinction Between *Revenue* Bonds and *General Obligation* Bonds" Issue.

The facts of this case might be viewed in such a way that the difference between the *revenue* bonds which were not financed in any way by property tax revenue in *Cipriano* and the *general obligation* bonds which are only partially financed by property tax revenue here are deemed to be differences without legal distinction. See also *Frank T. Stewart et al v. The Parish School Board of the Parish of St. Charles and School District No. 1 of the Parish of St. Charles,* (____ F Supp. ____ E D La, N O Div., No. 69-281 E, Section E, 1970). If this is the view taken, as was pointed out in the footnote in *Kramer,* the issue of compelling state interest need not be reached. *Kramer,* footnote 14 at 632, 89 S.Ct. at 1892.

If this is the view taken, this Court, logically, must also reiterate the assumption stated in both *Kramer* and *Cipriano* that:

> ". . . a state might, in some circumstances, constitutionally limit the franchise to qualified voters who are also 'specially interested' in the election" *Cipriano* at 704, 89 S.Ct. at 1900; *Kramer* at 632, 89 S.Ct. at 1892.

The Poudre R-1 School District submits that if the assumption might mean anything at all it would mean that a state could constitutionally limit the franchise in school *general obligation* bond elections to those qualified voters who alone will be burdened by the repayment of the debt. This is the exact situation in Colorado by state constitution and statutes.

The very least this Court should do, therefore, if it upholds the lower court on this limited factual ground, is to clearly compare the facts of this case to the facts of *Cipriano* and to clearly state the reasons why the facts here do not support a legal distinction of this case from *Cipriano*. In other words, this Court should so narrowly word its opinion here that the bonds approved in the Poudre R-1 School District are not adversely affected.

b. On the Compelling State Interest Issue.

If the issue of compelling state interest is reached, this Court necessarily must determine that there are real distinctions between *revenue* bonds and *general obligation* bonds and that such distinctions are apparent from the facts of this case. The decision here, therefore, will not be merely a decision made because of the binding effect of *Cipriano,* as held by the trial court on its second alternative ground. If this Court reaches the compelling state interest question, the decision here will be on complex issues of first impression, *Kramer* footnote 14, 395 U.S. at 632, 89 S.Ct. at 1892; issues subject to rational disagreement - witness the many amicus curiae briefs filed herein. See also *Muench v. Pain,* supra; *Settle v. City of Muskogee,* supra, *Settle v. Board of County Commissioners of the County of Muskogee,* supra; cf. *Stewart v. The Parish School Board of the Parish of St. Charles and School District No. 1 of the Parish of St. Charles,* supra.

3. There Is as Much Reason Here to Apply a Decision Upholding the Lower Court Prospectively Only as There Was in *Cipriano*.

Either because the facts here do not justify a distinction between the type of *general obligation* bond involved here and the type of *revenue* bond involved in *Cipriano* or because the issue of compelling state interest should be reached here, the reasons used in *Cipriano* to justify giving the decision there only prospective effect are just as applicable here.

If this case is decided on the basis that the facts do not justify a distinction between this case and *Cipriano,* the decision should be given only prospective effect for two reasons. First, the decision would not end the matter as to those jurisdictions with fact situations where a basis for distinction exists between *revenue* and *general obligation* bonds. Second, those other jurisdictions would not be so clearly subject to *Cipriano* as to constitute a deliberate defiance of its holding. *Allen v. State Board of Elections,* supra.

If the case here is decided on the compelling state interest ground, the decision should be given only prospective effect because the question involves a complex issue of first impression in this Court. Further, witness the many amicus briefs filed, the issues are subject to rational disagreement.

As to the manner of holding prospectively only, the *Brief For the Parish School Board of Caddo Parish, Louisiana, as the Governing Authority of Parish Wide School District of Caddo Parish, Louisiana, as Amicus Curiae,* is incorporated herein by this reference. It should be noted that the statement made therein concerning no Colorado statutory contest period (page 11) is not entirely accurate - at least insofar as school general obligation bond elections are concerned. *Colorado Revised Statutes* 1963, 1965 Perm. Cum. Supp. 123-11-12(2). The inaccuracy, however, is unimportant in regard to the general argument of that brief.

V. CONCLUSION

The position of the Poudre R-1 School District is that, under Colorado law, the time for challenging the election result has expired and no challenge has been filed. The authorization to issue the securities is legally complete if a distinction is recognized between this case and the *Cipriano* case and the decision of this Court is either in favor of the City of Phoenix, et al., or, if against the City, it is given only prospective effect.

The Poudre R-1 School District, therefore, respectfully and specifically asks this Court to do any one of three alternative things in its decision in this case:

A. First, as a matter of compelling state interest, it asks this Court to hold that, because of the real and significant distinctions between *revenue* bonds and *general obligation* bonds, it is constitutionally permissible to limit the franchise in *general obligation* bond elections to those taxpaying electors who have to bear the burden of the lien encumbrance to secure the obligation to pay the debt of the bond; or,

B. Second, if it is not a matter of compelling state interest to limit the franchise to taxpaying electors, the School District asks this Court to make its decision prospectively effective only so as to remove the cloud from its voter approved bonds; or

C. Third, if the issue of compelling state interest is not reached, it asks this Court to base its decision on such clearly stated narrow factual grounds as to not adversely affect the *general obligation* school bonds approved in its district.

Respectfully submitted,

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AFFIDAVIT OF SERVICE

STATE OF COLORADO)
) ss.
COUNTY OF LARIMER)

The undersigned, one of the counsel for Poudre School District R-1, Larimer County, Colorado, as Amicus Curiae, being first duly sworn upon oath deposes and says that a copy of the foregoing brief has been served on all counsel of record by depositing on this date copies thereof in the United States Air Mail, postage prepaid, addressed to each of them, at their respective addresses of record.

B. F. Napheys III

B. F. NAPHEYS III

Subscribed and sworn to before me this 25th day of March, 1970.

Tedra Wells

(Seal) TEDRA WELLS, Notary Public

My commission expires September 18, 1972.